

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

OCT 17 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Federal-State Joint Board on) CC Docket No. 96-45
Universal Service; Promoting)
Deployment and Subscribership)
in Unserved and Underserved Areas,)
Including Tribal and Insular Areas)

REPLY COMMENTS OF WESTERN WIRELESS CORPORATION
ON PETITIONS FOR RECONSIDERATION

Western Wireless Corporation's ("Western Wireless") petition for reconsideration of the *Twelfth Report and Order* in this proceeding 1/ proposes a revised framework for jurisdictional determinations under 47 U.S.C. § 214(e)(6) for tribal areas that "would give carriers more certainty, avoid undue delay in ETC designations, and simplify the decisionmaking process." 2/ The parties opposing Western Wireless' petition – the South Dakota Independent Telephone Coalition

1/ This Reply is filed pursuant to 47 C.F.R. § 1.429(g) and the Public Notice, *Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings*, CC Docket No. 96-45, Report No. 2439 (rel. Sept. 11, 2000), published in 65 Fed. Reg. 55979 (Sept. 15, 2000) (announcing submission of petitions for reconsideration of *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, FCC 00-208 (rel. June 30, 2000) ("*Twelfth Report and Order*")).

2/ Comments of Globalstar Government Services at 5 ("Globalstar"). As Globalstar recognizes, "Western Wireless' proposal would allow" carriers requesting ETC designation to serve Indian reservations to do so under "a unified system . . . without interfering with the jurisdiction of state commissions to designate ETCs outside Indian lands[.]" *Id.* at 9.

No. of Copies rec'd
List A

0411

(“SDITC”) and Project Telephone Company and Range Telephone Cooperative (“Project/Range”) – raise meritless objections based on their attempts to exclude competitive entry into their markets. The Commission should therefore grant Western Wireless’ petition for reconsideration.

Western Wireless’ proposal – that the FCC assume jurisdiction over petitions for eligible telecommunications carrier (“ETC”) designation for universal service offerings “directed to” reservations – establishes a clear and predictable standard that will expedite not only the qualification of new ETCs for Indian reservations, but result in the introduction of additional and improved services there as well. And, because Western Wireless’ proposal requires affirmative tribal cooperation and service “targeted” to the reservation, it ensures that the FCC will have ample jurisdiction under established federal Indian law to make the necessary ETC designation.

Contrary to the opposing parties’ contentions, Western Wireless’ proposal is based on well-established principles of Indian law, and provides a clear and straightforward set of principles to guide the FCC’s jurisdictional decision-making rather than the open-ended, case-by-case procedure contemplated in the *Twelfth Report and Order*. ^{3/} Western Wireless does not ask that the FCC abandon “particularized inquiries” for individual ETC petitions, ^{4/} but submits a streamlined

^{3/} See *Twelfth Report and Order*, ¶¶ 108, 117.

^{4/} *Contra*, Project/Range at 4.

set of principles to guide the Commission's consideration of each ETC petition for an Indian reservation pursuant to generally applicable principles of Indian law.

Western Wireless recently filed a Jurisdictional Supplement to its petition for designation as an ETC for the Crow Reservation, including the expert opinion of Professor Richard B. Collins, an Indian law scholar from the University of Colorado School of Law. ^{5/} As explained in the Jurisdictional Supplement, tribal authorities generally have jurisdiction over Indians on reservations, including transactions between non-Indians that voluntarily subject themselves to tribal authority and the Indians to whom they sell services. Thus, the Commission clearly has jurisdiction under Section 214(e)(6) over a carrier seeking to provide universal service to Indians residing on a reservation. A more complicated jurisdictional issue arises for transactions on reservations among non-Indians, and of course a designated ETC must serve both Indians *and* non-Indians in its service area. ^{6/} Thus, it is necessary to employ a balancing test to weigh the respective interests of the tribal, federal, and state governments in deciding where jurisdiction to designate ETCs serving non-Indians on reservations under Section 214(e) lies. ^{7/} By demonstrating that it meets the prerequisites of Western Wireless' directed-to-

^{5/} See Jurisdictional Supplement, filed by Western Wireless in *Western Wireless Corporation Petition For Designation as an Eligible Telecommunications Carrier and for Related Waivers to Provide Universal Service to the Crow Reservation in Montana*, CC Docket No. 96-45, October 2, 2000, pursuant to *Twelfth Report and Order*, ¶ 140.

^{6/} See Jurisdictional Supplement at 5-6.

^{7/} *Id.*

tribal-lands framework – tribal consent, targeted service, and use of federal funds to provide supported services – a carrier can show that the balance of interests supports designation by the FCC. 8/

With that understanding, each of the objections raised in the opposing comments can be summarily rejected. First, it is clear that tribal consent or collaboration has legal significance with respect to the issue of jurisdiction. 9/ The fact that a tribe has consented to or collaborated with a carrier regarding proposed universal service (*i.e.*, has entered an agreement or other explicit arrangement with the carrier) heightens the tribe’s jurisdictional interest in contracts between it and/or its members on the one hand, and providers of goods or services on the reservation on the other. 10/ Also, such an arrangement reflects the prospective

8/ These criteria result in (i) an agreement with the tribe for the new entrant to provide universal service on the reservation, (ii) the prospective ETC’s consent to tribal jurisdiction, (iii) a service offering in which the state has limited interest either due to geographic or regulatory limitations, and (iv) a strong federal nexus in the form of both federal funding and advancement of the federal trust responsibility to the Indian tribes. All of these are important considerations in the balancing of interests required under Indian law. *See id.* at 6-8.

9/ *Contra* Project/Range at 5.

10/ *Merrion v. Jicarilla Tribe*, 455 U.S. 130, 137-44 (1982); *Montana v. United States*, 450 U.S. 544, 565 (1981). Project/Range mischaracterizes the agreement with the tribe that Western Wireless’ proposed framework would require in order to trigger FCC jurisdiction under Section 214(e)(6). Project/Range at 5. The framework contemplates more than a mere land-use or right-of-entry agreement, but rather, an affirmative understanding between the tribe and the carrier that the carrier will provide universal service on the reservation to members of the tribe, on terms acceptable to the tribal governance.

ETC's affirmative consent to the tribe's jurisdiction, another important factor weighing in favor of tribal jurisdiction. 11/

Moreover, Project/Range fail to understand the jurisdictional significance of Western Wireless' proposal to distinguish "between a situation where a carrier 'provides' service on reservation and a carrier which 'targets' service to a reservation." 12/ Western Wireless offered four possible factors, any of which would establish that the service offering is "targeted" to a reservation, rather than on-reservation service that is a small part of a widespread offering: (1) the service is geographically targeted exclusively or primarily to the reservation; or (2) features of the service that the carrier offers to the tribe are different from services that the carrier offers elsewhere (*e.g.*, rate structure, pricing, or other aspects of how the service is marketed); or (3) the applicant has a special organizational structure, such as tribal ownership or role in governance; or (4) the applicant is a commercial mobile radio service ("CMRS") provider. 13/ As we show below, any of these factors would weigh in favor of tribal (and FCC) jurisdiction and against state jurisdiction. 14/ Accordingly, making "targeted" service a requirement for triggering FCC jurisdiction under Section 214(e)(6) is a sound approach.

11/ *Id.*

12/ Project/Range at 3.

13/ Western Wireless Petition for Reconsideration at 5-6.

14/ In the context of the distinction between service "targeted" to a reservation and that merely "provided" on a reservation, SDITC's citation to *Cheyenne River Sioux Tribe Telephone Authority v. Public Utilities Comm'n*, 595 N.W.2d 604 (S.D. 1999), for the proposition that state commissions can exercise jurisdiction over an

The first factor Western Wireless proposes for determining whether a non-tribal carrier's service is targeted to a reservation – whether it offers service solely or primarily on a reservation – is clearly relevant to whether the state commission has jurisdiction to regulate that service, notwithstanding the contrary contention by Project/Range. ^{15/} Consideration of the extent of tribal versus state interests has a significant geographic component. Whether an ETC's proposed service is limited to a reservation (and possibly incidental surrounding areas) ^{16/} as opposed to an area encompassing significant non-reservation lands therefore bears directly on the relative weight given to the state and tribal interests.

The second factor proposed by Western Wireless to allow a carrier to meet the targeted-to-a-reservation criterion – service features of the offering to the tribe that distinguish it from those the carrier provides elsewhere, such as different

on-reservation portion of a much larger overall service offering, is inapposite. See SDITC at 4. In that case, the South Dakota Commission denied part of a U S WEST application to sell 67 exchanges, only three of which, comprised of two off-reservation and one partially on-reservation exchanges, were being sold to the tribe. The court noted the PUC's extensive jurisdiction over U S WEST, and recognized that a significant portion of the three disputed exchanges were not within the reservation's borders. This is a far cry from a service offering that is "targeted" to a reservation rather than being a small part of a widespread offering, and which extends only incidentally beyond the reservation's boundaries.

^{15/} Project/Range at 5.

^{16/} Western Wireless clarifies that its use of the term "tribal lands" in its petition was intended to refer to reservations and incidental surrounding areas. See SDITC at 4; Project/Range at 2 n.2; *Federal-State Joint Board on Universal Service; Promoting Deployment And Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Order and Further Notice of Proposed Rulemaking, FCC 00-332 (rel. Aug. 31, 2000) (seeking to clarify definition of "near reservation" lands).

rate structures, pricing, and/or other aspects of how the service is marketed – is a close corollary of the first factor. Where the first factor looks at the geographic scope of the prospective ETC's overall offering, the second factor deals with whether the carrier has, distinct from its overall offering elsewhere, created a special service tailored to the reservation and the needs of the Native Americans residing there. Coupled with the required consensual arrangement with the tribe, this factor demonstrates the carrier's effort to purposefully craft a service unique to the Indian reservation, and it reinforces the tribe's interest in soliciting and receiving improved telecommunications service focused on its members.

The third alternative factor – a carrier's operational or organizational structure – also is clearly relevant to the jurisdictional balancing. 17/ Indian tribes have jurisdiction over their members and entities owned by their members. 18/ To the extent that Native Americans own or manage a prospective ETC's operations on a reservation – either in whole or in part – the balance of jurisdiction over the ETC tilts toward the tribe and the FCC. 19/

The last factor offered by Western Wireless is the fact that a carrier is a CMRS provider. A carrier's CMRS status may not generically eliminate state jurisdiction to designate it as an ETC, 20/ but it is a relevant factor in the balancing

17/ *Contra* Project/Range at 5-6.

18/ *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973).

19/ *See* Jurisdictional Supplement, Appendix A at 2-3 & n.10.

20/ Project/Range at 6; *Twelfth Report and Order*, ¶¶ 109-110.

test that applies to service on Indian reservations. In balancing the tribal and state interests, the fact that the state's interest in regulating CMRS carriers is very slight, due to the preemptive effects of 47 U.S.C. § 332(c)(3), is a significant factor that minimizes the state's jurisdictional interest. Conversely, it raises both the tribe's jurisdictional interest and the FCC's authority to designate. 21/

Finally, the fact that some carriers serving a reservation may be subject to state jurisdiction for ETC designation purposes, while others are subject to FCC jurisdiction for those purposes, 22/ is not particularly problematic. For example, it is clear that if a tribe formed an entity to provide universal service to its reservation, that entity would be subject to FCC jurisdiction for ETC designation under Section 214(e)(6), 23/ even if another carrier had already been designated by the state commission. To be sure, a state commission may designate some carriers that serve a reservation (but that may also offer significant service *outside* the reservation) as ETCs, while the FCC designates other carriers serving the reservation. But this is the natural outgrowth of the fact that analyses of state-tribal jurisdiction have substantial geographic and population components. 24/

21/ See Jurisdictional Supplement at 7.

22/ Project/Range at 7.

23/ See *Petition of Saddleback Communications for Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6)*, 11 FCC Rcd 22433 (1998); *Ft. Mojave Telecomms., et al.*, 11 FCC Rcd 4547 (1998) (both designating wholly owned tribal carriers as ETCs under Section 214(e)(6)).

24/ See Jurisdictional Supplement, Appendix A at 1-2.

Adoption of Western Wireless' proposed framework would break no new ground in this regard.

The foregoing demonstrates the legal soundness of Western Wireless' proposed jurisdictional framework for ETC designations on Indian reservations. As Globalstar points out, "the approach proposed by Western Wireless offers many more public interest benefits" 25/ than the process adopted in the *Twelfth Report and Order*. By contrast, Project/Range's alternative proposal is clearly inferior. Project/Range proposes that instead of developing a workable framework for tribal jurisdictional determinations, the FCC should establish a Joint Board or other forum to confer with the states – notably, *not* with the tribes themselves! – to address issues involving jurisdiction to regulate telephone service on reservations. 26/ While offered as a rebuttal to "accusations that incumbent LECs are merely seeking to maintain the status quo," 27/ the Project/Range proposal will serve only to delay resolution of the Section 214(e)(6) jurisdictional issues. The proposed forum would examine such far-ranging topics as "validity of certificates of public convenience and necessity, ETC designations, liability for service standards, reasonableness of rates and practices . . . , and the ability of tribal governments to replicate the functions [of] state commissions[.]" 28/ None of these issues has any bearing on whether the

25/ Globalstar at 7.

26/ Project/Range at 8-9.

27/ *Id.* at 9.

28/ *Id.*

FCC, rather than a state commission, has jurisdiction to designate an ETC seeking to serve an Indian reservation. The FCC should reject Project/Range's transparent attempt to direct attention and resources away from consideration of more workable approaches to jurisdiction under Section 214(e)(6).

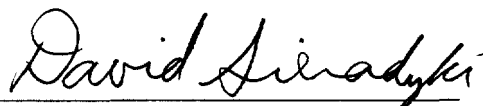
Conclusion

For the foregoing reasons, Western Wireless respectfully requests that the Commission grant Western Wireless' petition for reconsideration proposing a standard by which the FCC may assume jurisdiction under Section 214(e)(6) over ETC petitions directed to Indian reservations.

Respectfully submitted,

**WESTERN WIRELESS
CORPORATION**

By:



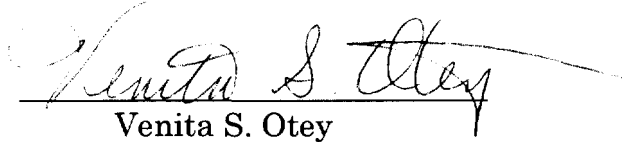
Gene DeJordy,
Vice President, Regulatory Affairs
WESTERN WIRELESS CORPORATION
3650 - 131st Ave. S.E., Suite 400
Bellevue, WA 98006
(425) 586-8055

Michele C. Farquhar
David L. Sieradzki
Ronnie London
HOGAN & HARTSON, L.L.P.
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5600

October 17, 2000

CERTIFICATE OF SERVICE

I, Venita Otey, hereby certify that on this 17th of October, 2000, in addition to the courtesy copies sent to the individuals on the attached Service List, the foregoing Reply Comments were served on the following by hand delivery or by mail.



Venita S. Otey

Cynthia B. Miller
State of Florida
Public Service Commission
Bureau of Intergovernmental Liaison
Capital Circle Office Center
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Charles J. Scharnberg
SBC Communications Inc.
1401 I Street, N.W., 11th Floor
Washington, D.C. 20005

L. Marie Guillory
Jill Canfield
National Telephone Cooperative
Association
4121 Wilson Boulevard, 10th Floor
Arlington, VA 22203

Steven R. Beck
QWEST Corporation
1020 19th Street N.W., Suite 700
Washington, D.C. 20036

Richard D. Coit
General Counsel
South Dakota Independent
Telephone Coalition
207 E. Capitol, Suite 206
P.O. Box 57
Pierre, SD 57501

Milton Hooper
Chairman
Goshute Business Council
Confederated Tribes of the Goshute
Reservation
P.O. Box 6104
Ibapah, Utah 84034

Sam S. Painter
General Counsel
Crow Tribal Council
P.O. Box 159
Crow Agency, Montana 59022

Joseph F. McCornell
President
Fort Belknap Indian Community Council
R.R. 1, Box 66
Fort Belknap Agency
Harlem, Montana 59526

William Kindle
Chairman
Rosebud Sioux Tribe of South Dakota
Sicangu Oyate
P.O. Box 430
Rosebud, South Dakota 57570

James A. Casey
Greenberg Traurig, LLP
800 Connecticut Avenue, N.W.
Washington, D.C. 20006
(Counsel for Salt River
Pima-Maricopa Indian Community
and Saddleback Communications)

Alice E. Walker
Scott B. McElroy
Greene, Meyer & McElroy, P.C.
1007 Pearl Street, No. 220
Boulder, Colorado 80302
(Attorneys for Cheyenne River
Sioux Tribe Telephone Authority)

Wilbur Between Lodges
Vice Chairman
Oglala Sioux Tribe
Box H
Pine Ridge, South Dakota 57770

William D. Wallace
Crowell & Moring
1001 Pennsylvania Avenue N.W.
Washington, D.C. 20004
(Counsel for Globalstar, L.P.)

William F. Adler
Globalstar, L.P.
Vice President, Legal and Regulatory
Affairs
3200 Zanker Road
San Jose, CA 95134

David Cosson
Kraskin, Lessee and Cosson, L.L.P.
2120 L Street, N.W.
Suite 526
Washington, D.C. 20036
(Counsel for Project Telephone Company
and Range Telephone Cooperative)

SERVICE LIST

Kathy C. Brown
Chief of Staff
Office of Chairman William Kennard
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D. C. 20554

Anna Gomez, Legal Advisor
Office of Chairman Wm. E. Kennard
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Jordan Goldstein, Legal Advisor
Office of Commissioner Susan Ness
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Rebecca Beynon, Legal Advisor
Office of Comm'r Harold Furchgott-Rott
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Kyle Dixon, Legal Advisor
Office of Comm'r Michael Powell
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Sarah Whitesell, Legal Advisor
Office of Commissioner Gloria Tristani
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Christopher J. Wright
General Counsel
Federal Communications Commission
445 Twelfth Street, S. W.
Washington, D. C. 20554

Dorothy Attwood
Common Carrier Bureau Chief
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Carol Matthey
Deputy Chief
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Katherine Schroder
Division Chief
Accounting Policy Division
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S. W.
Washington, D. C. 20554

Sharon Webber
Deputy Division Chief
Accounting Policy Division
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S. W.
Washington, D. C. 20554

Lisa Boehley
Accounting Policy Division
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W., 8-A668
Washington, D.C. 20554

Katie King
Accounting Policy Division
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S. W.
Washington, D. C. 20554

Robert Loube
Policy Analyst
Accounting Policy Division
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S. W.
Washington, D. C. 20554

Richard D. Smith
Accounting Policy Division
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S. W.
Washington, D. C. 20554

Jack Zinman
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S. W.
Washington, D. C. 20554

Cynthia B. Miller
State of Florida Public Service
Commission
Bureau of Intergovernmental Liaison
Capital Circle Office Center
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Charles J. Scharnberg
SBC Communications Inc.
1401 I Street, N.W., 11th Floor
Washington, D.C. 20005

L. Marie Guillory
Jill Canfield
National Telephone Cooperative
Association
4121 Wilson Boulevard, 10th Floor
Arlington, VA 22203

Steven R. Beck
QWEST Corporation
1020 19th Street N.W.
Suite 700
Washington, D.C. 20036

Richard D. Coit
General Counsel
South Dakota Independent Telephone
Coalition
207 E. Capitol, Suite 206
P.O. Box 57
Pierre, SD 57501

Milton Hooper
Chairman
Goshute Business Council
Confederated Tribes of the Goshute
Reservation
P.O. Box 6104
Ibapah, Utah 84034

Sam S. Painter
General Counsel
Crow Tribal Council
P.O. Box 159
Crow Agency, Montana 59022

Joseph F. McCornell
President
Fort Belknap Indian Community Council
Fort Belknap Indian Community
R.R. 1, Box 66
Fort Belknap Agency
Harlem, Montana 59526

William Kindle
Chairman
Rosebud Sioux Tribe of South Dakota
Rosebud Sioux Tribe
Sicangu Oyate
P.O. Box 430
Rosebud, South Dakota 57570

James A. Casey
Greenberg Traurig, LLP
800 Connecticut Avenue, N.W.
Washington, D.C. 20006

Alice E. Walker
Scott B. McElroy
Greene, Meyer & McElroy, P.C.
1007 Pearl Street, No. 220
Boulder, Colorado 80302

Wilbur Between Lodges
Vice Chairman
Oglala Sioux Tribe
Box H
Pine Ridge, South Dakota 57770

International Transcription Service
Federal Communications Commission
1231 20th Street, N.W.
Washington, D.C. 20554